GOLAM HASSAN MUHAMAD

v.

SUSILA SINNAKANU & ANOR.

SUPREME COURT, KUALA LUMPUR
WAN SULEIMAN SCJ
HASHIM YEOP SANI SCJ
WAN HAMZAH SCJ
[CIVIL APPEAL NO. 102 OF 1985]
3 FEBRUARY 1987

TORT: *Civil Law Act 1956 - Sections 7, 8 - Whether damages in respect of pain and suffering should have been assessed together with damages in respect of dependency claim under s. 7.*

CIVIL PROCEDURE: *Appeal - Judge's finding of fact - Whether supported by evidence - Whether adequate consideration given to matters in issue.*

Subramaniam s/o Muniandy ("the deceased") filed a claim for damages against the appellant for negligence. Pending trial, he died and the writ and the statement of claim were amended to substitute his widow and another person as plaintiffs to bring the claim under ss. 7 and 8 of the Civil Law Act 1956 ("the Act").

Outwardly, the deceased suffered an abrasion over his left forearm and a laceration on his left leg. Following his discharge from the hospital, he started developing fits. Later, X-rays of his skull showed no fracture but an angiogram of his brain showed that the midline of the brain had been shifted to the left. The deceased died some 2½ years after the accident whilst waiting for his turn to undergo a computer scan of his brain.

The trial Judge accepted the evidence of Dr. Balaratnam and also the evidence of the deceased's wife and brother-in-law that the deceased had never suffered from fits before the accident.

The learned trial Judge awarded RM1,850 as special damages RM20,000 as damages for pain and suffering, and RM32,200 as damages for the deceased's family under s. 7 of the Act.

The main grounds of appeal were:

(i) That the learned Judge erred in holding that the deceased died as the result of the injuries which he suffered as a result of the collision.

(ii) That the learned Judge should have treated the two items of damages as being merged, i.e., in giving damages under s. 7, the learned Judge should have taken into account the damages which were assessed in respect of pain and suffering.

Held:

[1] There was evidence to support the conclusion of the learned Judge and she had not made any wrong inferences. The learned Judge had also adequately considered the matters that are being complained of.

[2] The damages for pain and suffering assessed in this case under s. 8 should be taken into account in the assessment of damages under s. 7 of the Act.

[3] That meant that the respondents should be awarded damages of RM32,200 only under ss. 7 and 8 of the Act apart from the special damages of RM1,850. Their Lordships ordered that the judgment amount be reduced accordingly.

[Appeal allowed in part with costs.]

Cases referred to:

Davies v. Powell Duffryn Associated Colliers Ltd. [1942] AC 601
Andrews v. Freeborough [1966] 2 All ER 721
Tan Choi Thin & Anor. v. Teo Whee Hong [1953] 19 MLJ 203
Lok Yin v. Pat Thoo [1948] 14 MLJ 26
Feay v. Barnwell [1938] 1 KBD 31

Legislation referred to:

Civil Law Act 1956, ss. 1(5), 7, 8
Law Reform (Miscellaneous Provisions) Act 1934 [UK], s. 1(5)

For the appellant - Khoo Eng Chin (A.K.J. D'Cruz with him); M/s. A.K.J. D'Cruz & Co.
For the respondents - R.K. Nathan; M/s. R.K. Nathan & Co.

JUDGMENT

Wan Hamzah SCJ:

On 5 August 1977 Subramaniam s/o Muniandy (hereafter referred to as the deceased) was riding a motorcycle when it collided with a car driven by the appellant, as the result of which he suffered some injuries. On 31 July 1978 he filed a claim in the High Court for damages against the appellant for negligence. On 23 March 1980 he died. His writ and statement of claim were amended so that his widow and another person have been substituted as the plaintiffs and the claim has now been brought under ss. 7 and 8 of the Civil Law Act 1956. At the trial the learned Judge of the High Court gave judgment in the sum of RM1,850 as special damages, in the sum of RM20,000 as damages for pain and suffering, and in another sum of RM32,200 as damages for the family of the deceased pursuant to s. 7 of the Act. There are two main grounds for bringing this appeal:

(a) The learned Judge erred in holding that the deceased died as the result of the injuries which he suffered as the result of the collision;

(b) The learned Judge should have treated the two items of damages as being merged. In other words in giving the damages under s. 7 the learned Judge should have taken into account the damages which was assessed in respect of pain and suffering.

The following are the facts of the case as stated by the learned Judge in her judgment. Outwardly the deceased suffered only minor injuries namely an abrasion over his left forearm and a 2" laceration on the lower 1/3 of his left leg that required to be sutured. He was warded in the district hospital, Kuala Pilah for 3 days and he was discharged on 8 August 1977. Following his discharge, the deceased started developing fits and each time this happened he sought treatment at the district hospital, Kuala Pilah, and at one stage he was re-admitted as a patient. However, in February, 1980; when his fits started to be persistent, the district hospital, Kuala Pilah, referred him to the University Hospital, Kuala Lumpur, where the doctor attending to him felt that he should be examined more thoroughly by the neuro-surgical unit of the General Hospital, Kuala Lumpur, where facilities were available to determine the cause effect of his fits. Following his admission to the General Hospital, Kuala Lumpur, on 29 February 1980, X-rays of his skull showed no fracture whatsoever but an angiogram of his

brain showed a contralateral shift of the anterior cerebral artery, i.e., the mid-line of the brain had been shifted to the left. Something had pushed the artery to the opposite side but the cause of this shift was never determined as the deceased died on 23 March 1980, whilst waiting for his turn to undergo a computer scan of his brain. In the meantime he developed acute gastro intestinal bleeding and despite efforts made to revive him, he succumbed to his illness due to the massive bleeding.

As to the ground of appeal (a) the complaints of the appellant can be summarised as follows. The learned Judge failed to appreciate that the long period of time that had passed between the accident and the death rendered the injuries received too remote to have any causal connection. She erred in preferring the evidence of expert witness Dr. C. Balaratnam to the evidence of another expert witness Dr. A. Mohandas. There was no evidence of any brain damage detected and X-rays showed no fracture of skull. The cause of the contralateral shift of the anterior cerebral artery was not determined. The impression reached by the surgical unit that the gastro intestinal bleeding developed from stress ulcer was not proved to be correct. It was therefore contended that the learned Judge should have held that the respondents had failed to discharge their burden of proving that the death was caused by injuries suffered as the result of the collision.

Dr. Balaratnam summarised his findings as follows. He stated that having seen all documents and having assessed all possibilities and probabilities it was his considered opinion that the gastro intestinal bleeding was caused by the stress which was caused by the shifting of the cerebral artery which was caused by the trauma experienced during the accident. He concluded that the deceased died of gastro intestinal bleeding and that the accident was the cause effect of his death. Earlier Dr. Balaratnam stated that from the law of probability the deceased had a trauma followed by recurrent left sided seizures. From the angiogram it was highly likely that he had a chronic subdural haematoma that was there all along from the time of accident but over the years it had slowly and assiduously become bigger and thereby accounting for his increased chronic seizures. At some point of time during the deceased's stay in the hospital the brain was compromised beyond its limit and developed acute gastro intestinal bleed and died. This is called Cushings ulcer. On the other hand Dr. Mohandas gave his opinion that the 2½ years' gap between the injury and the development of gastro intestinal bleeding was too wide to connect the brain injury as the cause of the gastro intestinal bleeding. He stated that there is a time limit for Cushing ulcer to occur from the onset of trauma, i.e. about two weeks from the onset of trauma, and it cannot happen after two years. The learned Judge gave her reasons for being more inclined to accept Dr. Balaratnam's evidence. In particular she stated that Dr. Mohandas' evidence that the ulcer can only develop two weeks from the onset of trauma is on his own admission unsupported by any other medical evidence. The learned Judge also accepted the evidence of the deceased's wife and brother-in-law that the deceased had never suffered from fits before the accident.

As regards the other complaints in the memorandum of appeal Dr. Balaratnam's evidence shows that he had considered all aspects relating to the question of fracture of skull, the brain, the shift of the cerebral artery, the gastro intestinal bleeding, stress ulcer and other relevant matters before making his findings as stated above and the learned Judge accepted his findings. We find that there is evidence to support the learned Judge and that she had not made any wrong inferences. We also find that the learned Judge had adequately considered the matters that are now being complained of.

As to ground (b), Counsel for the respondents relies on s. 8(5) of the Civil Law Act for contending that the learned Judge was right in awarding the two items of damages in full without deduction of one from the other. Section 8(5) reads -

> The rights conferred by this section for the benefit of the estate of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by s. 7 and so much of this section as relates to causes of action against the estates of deceased persons shall apply in relation to causes of action under the said section as it applies in relation to other causes of action not expressly excepted from the operation of subsection (1).

An issue similar to the one which is now raised here, was considered by the House of Lords in the case of *Davies v. Powell Duffryn Associated Colliers Ltd.* [1942] AC 601. Like s. 7 of the Civil Law Act, the Fatal Accidents Act 1846 of England provides that whensoever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused. Like s. 8 of the Civil Law Act, the Law Reform (Miscellaneous Provisions) Act 1934 of England provides that on the death of any person all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate, except certain causes of action specified therein. It also contains in s. 1(5) provisions similar to s. 8(5) of the Civil Law Act. In that case the House of Lords held that damages for shortened expectation of life recoverable under the Law Reform (Miscellaneous Provisions) Act 1934, should be taken into account in assessing damages under the Fatal Accidents Act 1846, in the case of the dependants who would benefit from the damages under the Act of 1934. Per Lord Russell of Killowen-

> The general rule which has always prevailed in regard to the assessment of damages under the Fatal Accidents Acts is well settled, namely, that any benefit accruing to a dependant by reason of the relevant death must be taken into account. Under those Acts the balance of loss and gain to a dependant by the death must be ascertained, the position of each dependant being considered separately. It is rightly conceded that the general rule must apply unless some statutory exception to it prevents its application. There are two well-known instances in which such a statutory exception has been enacted. One is the case of life insurance ... The other instance relates to pensions ... The appellants claim that a statutory exception to the rule in relation to damages recoverable under the Act of 1934 is to be found in s. 1, sub-section 5, of that Act, which runs thus:
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> > The rights conferred by this Act for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the Fatal Accidents Acts 1846 to 1908. All that this subsection does, according to the language used, is to provide that the rights shall co-exist, but I can find no words which would justify me in holding that the subsection purports to alter the measure of the damages recoverable for the benefit of a dependant under the Fatal Accidents Acts. The language of the sub-section falls far short of this, and its weakness for the purpose to which the appellants seek to apply it is emphasised by a comparison of the language used therein with the clear and unambiguous provisions of the two statutory exceptions to which I have referred and by the fact that the Act which enacts the earlier of the two exceptions is actually mentioned in the sub-section in question. It was sought to extract some special meaning from the dual phrase "shall be in addition to and not in derogation of." This, it was said, was not idly tautological,

> but intentionally cumulative, and the words "not in derogation of" involved a direction that there was to be no taking away or deduction from or diminution of the damages obtainable under the Fatal Accidents Acts. For myself, I can see no sufficient ground for reading this subtle hidden meaning into the sub-section. I agree with the Court of Appeal that the words "and not in derogation of" merely emphasize what has been already said, that the rights conferred by one Act are additional to the rights conferred by the other Acts, and are to that extent tautological.

Counsel for the respondents referred to the case of *Andrews v. Freeborough* [1966] 2 All ER 721 and pointed out that in that case the total amount of two items of damages, one for loss of expectation of life and the other for loss of faculty, was awarded without deduction. In that case a girl aged eight, was injured in a motor accident. From the time of her being injured until her death nearly a year later she was unconscious and without pain and without appreciation of what had happened to her. In an action by her father as administrator of her estate general damages of £2,500 were awarded, of which £500 was for loss of expectation of life and £2,000 for loss of faculty. The Court of Appeal affirmed the award. In our view damages for loss of expectation of life and damages for loss of faculty were damages properly assessed under the Law Reform (Miscellaneous Provisions) Act 1934. The report does not show that damages were also assessed under the Fatal Accidents Act, and therefore in that case there would be no question of or necessity for any deduction in the damages assessed.

Davies' case was followed in this country in the case of *Tan Choi Thin & Anor.v. Teo Whee Hong* [1953] 19 MLJ 203 in which claims were brought under the Civil Law Ordinance Cap. 42 of the Straits Settlements. *Lok Yin v. Pat Thoo* [1948] 14 MLJ 26 was another case in which the same principle was adopted. In *Feay v. Barnwell* [1938] 1 KBD 31 a woman was killed in a street accident as the result of the defendant's negligence. Damages were assessed at £625 under the Fatal Accidents Act 1846, and at £600 under the Law Reform (Miscellaneous Provisions) Act 1934 in respect of pain and suffering and loss of expectation of life. The net amount of damages in respect of pain and suffering and loss of expectation of life of £575 (after reduction of £25 for administration expenses) was deducted from the £625 damages under the Fatal Accidents Act and the balance sum of £50 was awarded to the plaintiff under the Fatal Accidents Act together with the £600 damages under the Law Reform Act.

Therefore we hold that the damages of RM20,000 for pain and suffering assessed in this case under s. 8 should be taken into account in the assessment of damages under s. 7. This means that the plaintiffs should be awarded damages of RM32,200 only under ss. 7 and 8 apart from the special damages of RM1,850. We order that the judgment amount be reduced accordingly. To that extent this appeal is allowed, with costs to the appellant. We also order that the deposit be refunded to him.

Also found at [1987] 1 CLJ 447